

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:	}	
	}	
Retransmission Consent, Cable Network	}	RM-11203
Non-Duplication, and Syndicated Exclusivity	}	
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**TO: OFFICE OF THE SECRETARY
ATTN: THE COMMISSION**

REPLY COMMENTS

Pappas Telecasting Companies ("Pappas"), by and through its attorneys, hereby submits the following Reply Comments in the above-referenced proceeding relating to the Petition For Rulemaking filed by American Cable Association ("ACA") on March 2, 2005.¹ As expressed in the Petition, ACA seeks to hold the well-established statutory right of broadcasters to enter into retransmission consent negotiations hostage by forcing broadcasters to relinquish market exclusivity if they choose to exercise that right. Pappas filed comments on April 18, 2005, strongly opposing the Petition, and urging the Commission to dismiss the Petition.

It comes as no surprise that comments filed by cable operators and their trade organizations are in support of the Petition, particularly since one must assume that ACA's petition is just a first step in an effort to apply this Hobson's Choice to all retransmission consent negotiations. Broadcasters and their trade organizations agree with Pappas that the Petition has no merit, and should be dismissed. What is surprising, however, is the failure of ACA and those filing comments in support of the Petition to provide any valid support for their radical proposal. Instead, the arguments presented in almost all of the supportive comments

¹ See *Petition for Rulemaking*, filed by ACA on March 2, 2005 (the "Petition"). The Commission released a Public Notice of the filing of the Petition on March 17, 2005 (Rpt. No. 2696), establishing May 3, 2005, as the deadline for submitting Reply Comments in this proceeding.

boil down to the following: Small cable companies are facing additional competition from satellite and other MVPD providers and, therefore, the Commission should eliminate the statutorily-provided retransmission rights provided to broadcasters to ensure that small cable companies do not have to negotiate with broadcasters for the carriage of their signal. The underlying premise of ACA's Petition is that small cable companies should be able to carry the broadcaster's signal for free.

As discussed fully in Pappas' comments, the sole interest of the cable operators to seek a competitive advantage in these negotiations hardly warrants undermining the statutory rights granted to broadcasters in the Cable Act of 1992 and the Satellite Home Viewer Improvement Act of 1999.²

A substantial majority of ACA's supporters --- comprising more than 60% of those that filed comments in the proceeding --- utilized the same cookie-cutter form in filing their comments. These comments provided no substantive legal basis for effectively eliminating the broadcasters' right to enter into retransmission consent negotiations, and, therefore, should be afforded, little, if any, weight in the Commission's analysis of the proposed rules.

By issuing the public notice requesting comments on the Petition, the Commission provided ACA and its membership an opportunity to present compelling arguments for the vast re-write of the FCC rules adopted to implement the Cable Act and SHVIA which they are proposing. However, they have utterly failed to do so. Therefore, given the tremendous adverse impact that ACA's proposals would have on local broadcasters, and those with whom broadcasters negotiate to obtain programming for their stations, the absolute failure of ACA and

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act"). See also Intellectual Property and Communications Omnibus Reform Act of 1999, Pub L. No. 106-113, 113 Stat. 1501, Appendix 1 (1999)("SHVIA").

its members to put forth a sufficient basis for the proposed rules renders the Petition ungrantable, and the Commission must dismiss the Petition without further consideration.

DISCUSSION

In response to the Petition, and in anticipation of the likely arguments that ACA and its membership would offer in their supportive comments, Pappas and other broadcasters³ presented a comprehensive analysis as to why ACA's Petition is meritless, would violate the statutory provisions of the Cable Act and SHVIA, and is not in the public interest. At the same time, those supporting the Petition merely recited the arguments originally presented in the Petition, arguments that fail to justify the unprecedented --- and unlawful --- rewriting of the FCC rules implementing the Cable Act and SHVIA.

A. "COOKIE-CUTTER" COMMENTS IN SUPPORT OF PETITION FAIL TO SUBSTANTIATE A LEGAL BASIS FOR ELIMINATING BROADCASTERS' UNFETTERED RIGHT TO ENTER INTO RETRANSMISSION CONSENT NEGOTIATIONS.

A great majority of the comments filed in response to the Public Notice used a set-format apparently provided by ACA. Specifically, more than forty cable operators filed nearly identical comments in support of the Petition, which provided a short background on the party, and then presented the same arguments, and, in most cases, the same language apparently prepared by ACA, to support the Petition.

These commenters argue that they are the true standard bearers for localism in their communities, since they are protecting their customers from additional subscription fees that

³ See *Comments of The Walt Disney Company*, RM-11203, filed April 18, 2005; See also *Comments of the National Association of Broadcasters, CBS Television, The Walt Disney Company, NBC Telemundo License Co.*, RM 11203, filed April 18, 2005 ("Joint Comments"); See also *Comments of Duhamel Broadcasting Enterprises*, RM-11203, filed April 18, 2005; See also *Comments of NBC Universal, Inc. and NBC Telemundo License Co.*, filed April 18, 2005.

they allege would result from broadcasters entering into retransmission consent agreements with a cable operator.⁴ These parties argue that if the proposals in the Petition are adopted, cable operators will be able to obtain network programming at lower or no cost to the cable operator. Incredibly, these parties specifically justify their support for the Petition because “DBS competition has been a strong competitor in our markets, taking subscribers and making it difficult to increase rates.”⁵ These “woe is me” arguments of those who prefer a monopoly position in the marketplace have never been well received by the Commission.

Moreover, the Commission has been loath to dictate the terms of retransmission consent agreements. Specifically, when the Commission adopted the rules to implement the Cable Act, it clearly stated that it would stay out of the business of dictating the terms of retransmission consent agreements.⁶ In fact, the Commission acknowledged that Section 325 of the Communications Act, as amended, “contained no standards pursuant to which broadcasters were required to negotiate with MVPDs.”

Thus, as Pappas had asserted in its Comments, the true purpose for ACA’s filing of the Petition has been revealed to be no more than a cynical effort to shield themselves from the impact of additional competition in the MVPD market by seeking to hamstring the rights of broadcasters. In its comments, Pappas noted that many broadcasters had entered into retransmission consent agreements with DBS operators pursuant to which the DBS operator

⁴ See, e.g., *Comments of Shen-Heights TV Associates, Inc.*, RM-11203, filed April 18, 2005; *Comments of Sjoberg’s Inc.*, RM-11203, filed April 18, 2005; *Comments of Bevcomm*, RM-11203, filed April 18, 2005.

⁵ See *Comments of Galaxy Cablevision*, RM-11203, filed April 18, 2005, at pg. 1; See also *Comments of Comments of Milestone Communications, LP*, RM-11203, filed April 18, 2005, at pg. 1; See also *Comments of Sjoberg’s, Inc.*, at pg. 1; See also *Comments of City of Bardstown*, RM-11203, filed April 18, 2005, at pg. 2.

⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Broadcast Signal Carriage Issues*, 7 FCC Rcd 8055 (1992)(stating “It is not our intention, nor do we have the resources, to regulate every detail of the terms and conditions of retransmission consent agreements.”).

would provide very modest monetary compensation for the right to carry local broadcasters' signals, and that this decision was more reflective of the competitive state of MVPD programming than the anti-competitive, protectionist proposals proffered by ACA.⁷ The Petition should be seen for what it is --- a pre-emptive strike against increased competition the MVPD marketplace.

B. OTHER SUPPORTIVE COMMENTS ALSO FAIL TO JUSTIFY THE IMPERMISSIBLE GUTTING OF THE STATUTORY PROTECTIONS PROVIDED TO BROADCASTERS AND PROGRAM DISTRIBUTORS.

In addition to the nearly identical comments filed by a large portion of the parties participating in this proceeding, other MVPDs filed comments in support of the Petition. In supporting the Petition, one must assume that these parties ultimately intend to seek to extend the purported limited applicability of ACA's proposals to include other MVPDs.

For example, OPASTCO filed comments in support of the Petition, and attempted to extend ACA's proposals to include incumbent local exchange carriers.⁸ According to OPASTCO, rural telephone companies providing video programming face the same concerns as ACA's members, and thus, any revisions to the retransmission consent rules should include these entities as well.⁹

Moreover, Echostar Satellite, LLC, also filed comments in support of the Petition, and is seeking to include DBS operators in the proposed rule changes.¹⁰ According to Echostar, disparities among MVPDs should be avoided, and therefore, the Commission should extend the

⁷ See *Comments of Pappas Telecasting Companies*, at pg. 9.

⁸ *Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies*, RM-11203, filed April 18, 2005.

⁹ *Id.*, pg. 5. Other telephone companies providing video programming also filed similar comments. See *Comments of CT Communications Network, Inc., et. al.*, RM-11203, filed April 18, 2005; See also *Comments of BellSouth Corporation*, RM-11203, filed April 18, 2005.

¹⁰ *Comments of Echostar Satellite, LLC*, RM-11203, filed April 18, 2005.

applicability of the proposals “to address the adverse effects of the present retransmission consent framework on subscribers of all MVPDs.”¹¹

However, Echostar and the telephone companies fail to address the fact that the Cable Act and SHVIA prohibit the carriage of a broadcast signal without consent from the broadcaster, expressed either in the form of an agreement, or a must-carry election by the broadcaster. Like ACA, these parties also fail to justify why the ACA proposal to allow cable operators to immediately import distant signals at the broadcaster’s mere expression of an interest in receiving compensation for granting the right to carry its signals merits the evisceration of the signal carriage provisions of the Cable Act and SHVIA.

These parties also ignore the fact that local broadcasters have expended billions of dollars to construct digital transmission facilities and to retrofit their existing studios to provide digital programming in accordance with the Commission’s tight DTV transition schedule. The introduction of additional two to four multicast signals per local station substantially increases the value of the broadcasters’ product, and alters the nature of the negotiating positions of broadcasters and cable operators.

Finally, these parties fail to recognize that the proposed rules would undermine the basic structure of network broadcasting, which is premised on exclusivity within a certain geographic area. Under the proposed rules, network affiliation agreements grant exclusive rights to network programming within a certain geographic area. As NBC points out, ACA’s proposed changes would effectively require that “every network affiliate to have the authority to grant retransmission consent nationwide with respect to network programming.”¹² As a result, the

¹¹ *Id.*, pg. 2.

¹² *NBC Comments*, at pg. 2.

value of network programming, both for the network and its affiliates, would be substantially undermined, as would the bargained-for benefit of being a network affiliate.

By seeking to extend the limited applicability of the proposed modified rules to include telephone companies and DBS companies, coupled with the lack of a clear definition for “small cable companies” in ACA’s Petition,¹³ these “limited” proposals of ACA¹⁴ would become the rule if the Petition is granted.

CONCLUSION

Much as Pappas predicted in its Comments, ACA’s Petition has become a vehicle to fundamentally undermine the retransmission consent rights provided to broadcasters in the Cable Act and SHVIA. If the Petition is granted, it is clear that the right to elect between must-carry and to enter into retransmission consent agreements will be a right in name only, and the result would be for broadcasters to receive no compensation at all for the carriage of their signals.

The parties supporting the Petition have failed to establish that such a drastic step is either necessary or legal. Indeed, it is clear from the comments filed by Pappas and other broadcasters that the Cable Act and SHVIA granted to broadcasters the unrestricted right to enter into retransmission consent negotiations.

The only basis provided by ACA, its members, and other supporters of the Petition in their comments for such a drastic change is that any compensation that they might have to pay to broadcasters will affect their profit margin, and that they would have to pass such expenses

¹³ As the Joint Comments indicate, under Sections 76.95(a) and 76.106(b) of the Commission’s rules, network non-duplication and syndicated exclusivity do not apply to cable operators with less than 1000 subscribers. *See Joint Comments*, pg. 2.

¹⁴ *Petition*, at pg. 35.

directly on to their subscribers. DBS has paid very modest compensation to broadcasters and, yet, its market share is growing.¹⁵ Since when is the FCC in the business of re-writing the laws to protect the profit margins of erstwhile monopolists?

As it often reminds the public, the Commission is not in the business of picking winners and losers.¹⁶ In light of the statutory protections provided to broadcasters, the Commission can not create rules that would undermine Section 325 of the Communications Act to ensure that cable operators and other MVPDs protect their pecuniary interests. Therefore, Pappas Telecasting Companies urges the Commission to dismiss the Petition for Rulemaking filed by American Cable Association, and terminate this proceeding.

Respectfully submitted,

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¹⁵ *Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 54 (2005).

¹⁶ *See General Motors Corporation and The News Corporation Limited, et. al.*, 19 FCC Rcd 473, ¶¶ 248, 249, nt. 694 (2004)(citations omitted).